

1 Rene L. Valladares
2 Federal Public Defender
3 Nevada State Bar No. 11479
4 *Kimberly Sandberg
5 Assistant Federal Public Defender
6 New York State Bar No. 5152863
7 *C.B. Kirschner
8 Assistant Federal Public Defender
9 Pennsylvania State Bar No. 92998
411 E. Bonneville Ave., Ste. 250
Las Vegas, Nevada 89101
(702) 388-6577
Kimberly_Sandberg@fd.org
CB_Kirschner@fd.org

10 *Attorneys for Petitioner James David McClain
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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA

15 James David McClain,
16 Petitioner,
17 v.
18 Robert LeGrand, *et al.*,
19 Respondents.

Case No. 3:14-cv-00269-MMD-CLB

**Joint Motion to Continue
Evidentiary Hearing**

Introduction

An evidentiary hearing is set in this case for April 29 and 30, 2020. Both parties (Assistant Federal Defenders Kimberly Sandberg and C.B. Kirschner on behalf of McClain, and Senior Deputy Attorney General Charles L. Finlayson on behalf of Respondents) respectfully ask this Court to continue the hearing, and respective filing deadlines, for at least two months. The spread of the coronavirus disease (COVID-19) and the government recommendations in response to the spread will make it extremely difficult and dangerous to adequately prepare for the hearing, subpoena and meet with witnesses, and follow this Court's order to provide hard-copies of exhibit binders to the Courtroom Administrator prior to the hearing.

The Ninth Circuit has recognized the current pandemic "has disrupted services of all kinds" and is a valid basis for extending deadlines and cancelling in-person court appearances.¹ Given the nature of the evidentiary hearing, and number of witnesses, holding the hearing via video would not be feasible. Kimberly Sandberg, C.B. Kirschner, Investigator Adam Dunn, and Paralegal Katie McCarthy will have to travel by air to be present for the hearing, which would be in violation of the government's recommendations to avoid non-essential air travel.² Additionally, at least one person from the aforementioned group suffers an underlying medical condition which puts them in a *high risk* group. Finally, the hearing itself would involve a gathering of 10 people or more, which is against the

¹ <http://cdn.ca9.uscourts.gov/datastore/general/2020/03/16/COVID-19%20Notice.pdf>

² https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf; <https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html>

1 recommendations of the President's Coronavirus Guidelines for America and the
2 Centers for Disease Control and Prevention.³

3 Because of the unexpected pandemic caused by coronavirus, both parties
4 respectfully ask this Court to continue the hearing and all filing deadlines for two
5 months. If this Court grants a continuance, both parties also ask this Court to
6 allow counsel to ascertain the availability of all witnesses before setting a final date
7 for the hearing.

8 **A. Preparation for the hearing and subpoenaing witnesses**

9 Attorneys Kimberly Sandberg and C.B. Kirschner, along with Investigator
10 Adam Dunn, intended to travel to Reno on April 6, 2020, to meet with Dr. Brian
11 Leany and Martin Crowley in order to prepare for their testimonies. We also
12 intended to subpoena Mr. Crowley and Ms. Emm-Smith.⁴ This air-travel will no
13 longer be possible. The Federal Public Defender, District of Nevada, has ordered all
14 employees not to travel by air for work. The President's Coronavirus Guidelines for
15 America and the CDC have also recommended that people do not fly if possible.⁵
16 Preparing witnesses for testimony via Skype or other electronic means will be
17 extremely difficult, especially because many employees of the Federal Public
18 Defenders office have opted to telework (including undersigned counsel and
19 Investigator Adam Dunn). This means all parties would have to appear via Skype
20 from multiple locations to prepare the witnesses. At this time, we also do not know
21 whether Mr. Crowley has the capability to use Skype. Therefore, we ask this Court
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23 ³ Id.

24 ⁴ Although both witnesses were informed of the hearing date well in
25 advanced and agreed to be present, we will personally serve them subpoenas.

26 ⁵ [https://www.whitehouse.gov/wp-](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf)
27 [content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf);
[https://www.cdc.gov/coronavirus/2019-ncov/community/large-](https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html)
[events/index.html](https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html)

1 to continue the hearing so that the witnesses can be prepared in person at a time
2 when it is safer to travel, and at a time when social distancing is less urgent.

3 **B. Preparing and providing hard-copies of the exhibits**

4 Many members of the Federal Public Defender's Office and Attorney
5 General's Office are now either working remotely or anticipate working remotely in
6 the near future. Both parties have concerns about the adequacy of the VPN systems
7 and anticipate periods of limited network access. Coordinating and assembling
8 large numbers of exhibits may be difficult. Additionally, in the Federal Defender's
9 Office, the paralegal and legal assistant assigned to McClain's case are both
10 teleworking because of the coronavirus pandemic. While they are able to perform
11 many tasks remotely, preparing hard-copies of the voluminous exhibits and putting
12 them into binders is not one of them. This preparation requires a commercial grade
13 printer, which they do not have at their disposal.

14 **C. Travelling to the hearing and the hearing itself**

15 As noted above, FPD members Kimberly Sandberg, C.B. Kirschner, Adam
16 Dunn, and Katie McCarthy will have to travel to the hearing by air. The travel will
17 also include staying at a hotel and eating food from restaurants, all of which is
18 recommended against in the President's Coronavirus Guidelines for America and
19 the Centers for Disease Control and Prevention at this time.⁶ Furthermore, more
20 than 10 people will have to be in the courtroom at the same time for the hearing.
21 Additionally, the Nevada Department of Corrections has cancelled all in-person
22 visits, including legal visits, at this time. It is unclear whether it will be possible to
23 secure Mr. McClain's presence for the hearing. Limiting any possible exposure of
24 the virus into the prison system is of the utmost importance, given the close-quarter
25 living facilities and large number of high risk individuals.

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27 ⁶ Id.

D. The Nevada Attorney General's Office concurs with the Federal Public Defender's representations.

The Nevada Attorney General's Office concurs with the Federal Public Defender's representations and agrees that a continuance is appropriate. Senior Deputy Attorney General Charles L. Finlayson is currently co-managing the Post-Conviction Division while the Chief is on annual leave. Mr. Finlayson has been in constant contact with senior staff regarding the developing crisis. It is exceedingly difficult for Respondents to prepare for an evidentiary hearing at this time.

Conclusion

In light of the unexpected coronavirus pandemic, both parties respectfully ask this Court to continue the evidentiary hearing for at least two months, subject to a status report with this Court regarding the availability of witnesses. Both parties stipulate that, should a continuance be granted, all relevant filing deadlines should be extended accordingly.

Dated March 18, 2020.

Respectfully submitted,

/s/ Kimberly Sandberg

Kimberly Sandberg

Assistant Federal Public Defender

/s/ Charles Finlayson

Charles Finlayson

Senior Deputy Attorney General

/s/ CB Kirschner

C.B. Kirschner

Assistant Federal Public Defender